Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

MOBIL CORPORATION AND HONEYWELL INTERNATIONAL INC.,
Petitioners,

v.

BRUCE W. ADKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to the decisions of other federal and state courts, that the Due Process Clause of the Fourteenth Amendment permits the aggregation for a mass liability trial of thousands of disparate product-liability claims against hundreds of defendants without any inquiry into the commonality of those claims or the prejudice that would result from such an extraordinary undertaking.

2. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and in conflict with decisions of other federal and state courts, that the Due Process Clause permits a state court to apply its own state law to thousands of product-liability cases, aggregated for a mass trial, that the court itself has acknowledged have no connection at all to the state.

PARTIES TO THE PROCEEDING

Petitioners are Mobil Corporation and Honeywell International Inc. Respondents are Bruce W. Adkins and all other plaintiffs in the case styled *In Re: Asbestos Litigation*, Civil Action No. 01-C-9000, Kanawha County, as well as the Honorable Booker T. Stevens and Arthur M. Recht in their capacities as judges/special appointees of the West Virginia Mass Litigation Panel. There are approximately 8,000 plaintiffs in Civil Action No. 01-C-9000, and no caption in this proceeding identifies those individuals. Petitioners have lodged separately with the Court an unofficial list of the approximately 2,700 plaintiffs subject to the challenged trial order who have named petitioner Mobil as a defendant. (App. 40a-146a).

Petitioners before the Supreme Court of Appeals of West Virginia also included the Honorable Martin J. Gaughan, in his capacity as a judge/special appointee of the West Virginia Mass Litigation Panel (since recused and replaced by Judges Stevens and Recht, substituted as respondents here), and 117 other defendants who joined petitioners' petition for a writ of prohibition and/or mandamus.

Petitioners also have lodged separately with the Court an unofficial list of the approximately 250 other defendants subject to the challenged trial order (App. 147a-156a), as well as a list of the 117 other defendants who joined petitioners before the Supreme Court of Appeals of West Virginia (App. 157a-161a).

CORPORATE DISCLOSURE STATEMENT

Petitioner Mobil Corporation ("Mobil") is wholly owned by ExxonMobil Corporation. ExxonMobil has no parent corporations, and no publicly held companies own 10% or more of ExxonMobil's stock.

Petitioner Honeywell International, Inc. ("Honeywell") has no parent corporations, and no publicly held companies own 10% or more of Honeywell's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (App. 1a-19a) is reported at 563 S.E.2d 419. The concurring opinion of Justice Maynard (App. 19a-23a) is unreported. The order of the trial court (App. 24a-35a) is unreported.

JURISDICTION

The opinion of the Supreme Court of Appeals of West Virginia denying petitioners' petition for a writ of prohibition and/or mandamus was entered on April 25, 2002. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

The decision below approves a mass trial of thousands of product-liability cases alleging exposure to asbestos. The hundreds of defendants include premises owners, manufacturers, employers, and insurance carriers. The thousands of plaintiffs worked at hundreds of locations across the country, in different types of jobs, at different time periods spanning six decades, with different degrees of exposure and different individual health backgrounds. They were exposed to hundreds of different asbestos-containing products with different applications, instructions, and warning labels, and are assert-

ing different theories to recover for different injuries. In short, apart from the fact that their claims involve alleged exposure to asbestos, these approximately 8,000 plaintiffs have nothing in common.[1]

Under West Virginia's special mass litigation rule, Trial Court Rule 26.01, *see* App. 36a-39a, the liability of hundreds of defendants to these thousands of plaintiffs will be resolved at once. There will be no inquiry into whether that mass adjudication affords defendants a fair opportunity to defend themselves. A defendant will not, for example, have any opportunity to show that the claims against it have no logical relationship to the claims made against other defendants, or to demonstrate that the tremendous differences among defendants will be lost during a mass trial. And defendants will have no opportunity to show that particular claims have no connection to West Virginia, so that application of West Virginia law is precluded by established due process principles.

This application of Rule 26.01 exalts speed and efficiency above fundamental fairness. It turns upside down the established structure of a civil lawsuit, and allows West Virginia to impose its own asbestos solution on potential defendants nationwide. Indeed, the mere threat of these mass proceedings may well be enough to produce the desired result: with no prospect of a fair trial, defendants will face extreme pressure from the financial markets and other sources to settle thousands of claims, regardless of merit.

The constitutional problem is enormous, but the precise issues presented here are quite simple. The court below refused to conduct any inquiry into whether these 8,000 claims have enough in common that their mass trial will not unduly

[1] Eight thousand is a conservative estimate. Respondents' lawyers recently suggested that the number may be higher than 11,000. Plaintiffs' Proposed Trial Plan at 1; *see also* App. 3a n.3 (West Virginia Supreme Court noting that "we are uncertain as to the exact number of plaintiffs included in the litigation below"). Petitioner Mobil is named as a defendant in approximately 2,700 of these claims.

prejudice the defendants or confuse the jury. Contrary to the view of the West Virginia court, that inquiry is a matter of due process, not subject to override by a state trial rule. This Court has carefully mapped out the analogous constitutional limits on class actions filed in federal court. But now mass tort litigation is filed increasingly in state courts, and through vehicles other than class actions. The Court should take this opportunity to clarify that the same due process principles that prohibit standardless aggregations in federal court apply in state courts, as well.

A. The Asbestos Litigation Crisis.

1. This country is in the midst of an "asbestos-litigation crisis." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). The Court recognized as much in *Amchem*, and since then, the problem has only grown worse.[2] To address burgeoning asbestos dockets, even well-intentioned courts have adopted procedural rules intended to speed resolution of claims. But those efforts have simply fueled the fire, inviting more and more claims with little regard to merit. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).[3]

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[2] The number of asbestos cases pending in courts around the nation roughly doubled from 100,000 in 1991 to 200,000 in 1999. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearings on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. 5 (July 1, 1999) (Prof. Christopher Edley, Jr., Harvard Law School). All told, the number of future claimants could reach as high as 3.5 million. *See* Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 5 (Mar. 1991).

[3] West Virginia is a case in point. Early efforts to clear asbestos dockets through more modest consolidations attracted thousands of new claims, many of them from out of state. As the judge who oversaw those early consolidations ruefully concluded: "I will admit that we thought that [an early consolidation] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases." *In re Asbestos Litig.*, Civ. Action

In *Amchem*, Justice Breyer observed that "'[u]p to one half of asbestos claims are now being filed by people who have little or no physical impairment.'" 521 U.S. at 631 (Breyer, J., concurring in part and dissenting in part) (internal quotation omitted). Current estimates put the number as high as 90 percent. *See* Jennifer Biggs *et al.*, *Overview of Asbestos Issues and Trends* 3 (Dec. 2001). This flood of filings by unimpaired or less impaired plaintiffs diverts resources from the truly ill claimants who need them the most – a problem recognized by lawyers who represent injured plaintiffs.[4] It also contributes to multiplying bankruptcies among asbestos defendants,[5] leading to an ever-widening search for increasingly peripheral but still solvent defendants.

Petitioner Mobil illustrates the trend. Mobil is not an "asbestos company." It neither produces nor markets asbestos, and it has no corporate relationship with any entity that does. Instead, Mobil finds itself a defendant in this action only because it used small amounts of encapsulated asbestos as a component in a line of heat-resistant coatings products manufactured between 1963 and 1980. When asbestos is encapsulated – that is, when asbestos fibers in a product are "locked in . . . bound with cement, mastic, resin, oil base or some other substance" – there is "no release, certainly no significant release, of asbestos fibers in either working areas or general air." *In re Asbestos v. Bordelon*, 726 So.2d 926, 946 (La. 1998); *see also Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1144-45 (5th Cir. 1985). Indeed, today's regulations allow encapsulated products like Mobil's

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No. 00-Misc.-222, slip. op. (Cir. Ct. Kanawha Cty., W. Va. Nov. 8, 2000) (statement of Judge A. Andrew MacQueen III).

[4] *See "Medical Monitoring and Asbestos Litigation" – A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 39.

[5] More than 56 companies have been driven into bankruptcy to date, at least 18 in the last two years alone. *See* Mark A. Behrens, Editorial, *When the Walking Well Sue*, Nat'l L.J., Apr. 29, 2002, at A12.

heat-resistant coatings to be marketed and used without warning labels. *See* 29 C.F.R. § 1910.1001(j)(6)(i) (2001); *Asbestos Information Ass'n of N. Am. v. Reich*, 117 F.3d 891 (D.C. Cir. 1997). "[T]he net has spread from the asbestos makers to companies far removed from the scene of any wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14.

2. In *Amchem*, *supra*, and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court acknowledged the dimensions of the asbestos problem in the courts. But even those exigencies, the Court concluded, cannot justify mass aggregations of factually dissimilar cases. In *Amchem*, the Court invalidated a proposed class-action settlement of thousands of asbestos claims, holding that it failed to satisfy the standards of Rule 23 of the Federal Rules of Civil Procedure. 521 U.S. at 629. In *Ortiz*, the Court relied on constitutional concerns as well as on Rule 23 to invalidate another proposed class-action settlement. 527 U.S. at 846.

As a result of these holdings, mass asbestos litigation, as a general rule, is no longer pursued in federal court. Nor is it often pursued through Rule 23's state-law equivalents, with their procedural protections for class action plaintiffs and defendants. Instead, efforts to aggregate massive numbers of asbestos claims in state courts now focus on the less stringent standards that govern joinder and consolidation or, as in the instant case, on special state court mass litigation rules.

B. West Virginia Trial Court Rule 26.01.

In the early 1990s, West Virginia's courts began to permit large aggregations of asbestos cases under the state's civil procedure rule authorizing consolidation under certain prescribed circumstances. *See* W. Va. R. Civ. P. 42. In 1996, the Supreme Court of Appeals of West Virginia – the

state's highest appellate court[6] – approved a mass consolidation of claims filed against 17 defendants who owned facilities located in West Virginia. *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 302 (W. Va. 1996). Following that decision, thousands of new claims flooded West Virginia's courts.

The West Virginia Supreme Court responded by invoking its constitutional supervisory powers and enacting Trial Court Rule 26.01 in 1999. *See* App. 10a. Rule 26.01 establishes a Mass Litigation Panel ("MLP") with the power to "develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which [is] referred to it." App. 36a. The Rule does not establish any criteria for determining when a case should be transferred to the MLP. Nor does it indicate what transfer entails: whether, for instance, suits that have been transferred are "joined" or "consolidated" with other suits, for some purposes or for all. Apart from the reference to "fair[] and expeditious[]" procedures, the Rule provides no guidance at all as to how the MLP should resolve cases referred to it.

C. Proceedings Below.

On November 17, 2000, all "asbestos-based personal injury cases in West Virginia" were referred to the MLP by order of the West Virginia Chief Justice. *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 372 (W. Va. 2001). The next month, those pending asbestos cases were transferred to Judge MacQueen. *See id.* At the time, Mobil understood that the referral was for coordinated pretrial proceedings only, much like those authorized by the federal multidistrict litigation statute.[7] Mobil also reasonably believed that the

[6] West Virginia has no intermediate appellate courts. The Supreme Court of Appeals of West Virginia (hereinafter "Supreme Court") directly reviews the decisions of West Virginia's trial courts.

[7] *See* 28 U.S.C. § 1407(a) (allowing transfer of actions for pretrial proceedings, but requiring actions to be remanded to the districts from

presiding judge would review any proposal for consolidation or aggregation for trial purposes under established guidelines and procedures.

On May 23, 2001, Judge MacQueen entered a "master plan" permitting pre-trial discovery by both parties, in anticipation of a series of group trials containing between 20 and 100 plaintiffs each. *MacQueen*, 551 S.E.2d at 372. In July 2001, the West Virginia Supreme Court[8] rejected Judge MacQueen's plan, holding that a more expeditious approach was required. *Id.* at 375. Specifically, the court held that *all* of the thousands of pending asbestos trials should commence no later than July 1, 2002. *Id.* at 377. Invoking its supervisory powers, the court designated an additional judge to supervise the administration of the asbestos litigation, and ordered a report to the Chief Justice on the status of the case with a view toward a July 1, 2002 commencement of trial. *Id.* Three days later, Judge Martin Gaughan was appointed the supervising judge for all asbestos litigation.

On September 6, 2001, Judge Gaughan ruled that he would conduct a single "mass trial" of all asbestos claims. App. 4a-5a.[9] Over the due-process objections of petition-

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which they were transferred "at or before the conclusion of pretrial proceedings").

[8] Both plaintiffs and Mobil sought review of the master plan. Mobil argued against the so-called "small-group" trials on the ground that unrelated product-liability asbestos cases may not be aggregated for trial without a meaningful review of commonality and prejudice.

[9] Shortly thereafter, four railroad companies subject to the application of Rule 26.01 filed a § 1983 lawsuit in federal court, challenging on due process grounds the operation of Rule 26.01. The suit names as defendants the Justices of the Supreme Court as well as Judges MacQueen and Gaughan. *See Norfolk Southern Railway Co. v. Chief Justice Warren R. McGraw*, Case Number 2:01-1238 (D. W. Va. Nov. 29, 2001).

ers,[10] Judge Gaughan then entered the official "Trial Scheduling Order" ("TSO") on February 26, 2002. *Id.* 14a. Under the TSO, the mass trial, now scheduled for September 23, 2002, will resolve approximately 8,000 cases against three "groups" of defendants: manufacturers, premises owners, and employers. The first three phases of the mass trial – keyed to the three groups of defendants – will determine the fault of each defendant. The Group I trial, which includes petitioners and over a hundred other defendants, will resolve "the common issues of fault of all manufacturers and distributors of asbestos-containing products, as well as any defendants whose purported fault is based on an allegation of conspiracy, tortious joint venture, or other tortious combination with a manufacturer or distributor." App. 26a.

At the end of each of these three "fault" trials – but before any determination of causation or injury – the jury will consider punitive damages. For any defendant whose conduct warrants an award of punitive damages, the jury will select a "punitive damages multiplier" – that is, the number by which any subsequent award of compensatory damages should be multiplied to arrive at a punitive damages award. App. 15a. Causation and compensatory damages will be determined only after the fault phase is completed, either through mini-trials or through mini-trials in combination with a statistical matrix by which early verdicts are extrapolated to the remaining claims. *Id.* at 28a-29a.

Finally, the TSO provided for pretrial discovery by defendants and ordered plaintiffs to make certain basic "certifications," or disclosures, before the September 23 trial date: the nature of their claims, the place where they were residing when they were exposed to asbestos, and the products to

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[10] *See, e.g.*, Mobil Corporation's Objections and Request for Clarification in Response to the Court's Proposed Trial Scheduling Order at 2 (Jan. 31, 2002). Those objections were consistent with at least three previous filings—dated November 5, 2001, November 20, 2001, and December 12, 2001—before Judge Gaughan objecting to the Report. *See id.*

which they were exposed. App. 30a.

D. Decision Below.

On April 25, 2002, the West Virginia Supreme Court denied petitioners' request for relief and approved both the operation of Rule 26.01 and, in important respects, the trial plan set forth in the TSO.[11]

The court held, first, that the mass aggregation of plaintiffs' claims under Rule 26.01 is permissible even in the absence of findings regarding the risk of prejudice to defendants. The court acknowledged that West Virginia's consolidation rule – which tracks Rule 42 of the Federal Rules of Civil Procedure – requires a pretrial inquiry into whether cases set for consolidation have enough in common that there will be no undue risk of prejudice or juror confusion. App. 9a-14a & n.12. Because these cases were aggregated under Rule 26.01 rather than Rule 42, however, the court concluded that it could dispense with the standard inquiry into prejudice and confusion. *Id.* As the court summed up, Rule 26.01 has "effectively superseded" the ordinary inquiry into whether defendants' rights will be compromised by aggregation. *Id.* at 13a.

The West Virginia Supreme Court also rejected petitioners' argument that West Virginia law could not constitutionally be applied to these thousands of claims. The court failed even to address petitioners' argument that basic pretrial discovery of plaintiffs was required so that the defendants – and the court itself – could ascertain whether the claims of thousands of out-of-state plaintiffs could be adjudicated under

[11] Petitioners sought a writ of prohibition and/or mandamus, and argued against both the mass aggregation and application of West Virginia law on due process grounds. *See* Pet'rs Memo. at 21 ("The denial of [factual] findings [prior to aggregation] violates the United States Constitution"); *id.* at 26 ("United States Supreme Court has established that, as a matter of due process, a state cannot categorically apply its substantive law to govern claims in which a state has little or no interest"). Several plaintiffs cross-petitioned for relief from the TSO discovery provisions.

West Virginia law consistent with the Due Process Clause. *See* Mobil Corporation's Response to Certain Asbestos Plaintiffs' Petitions for Extraordinary Writs at 7. Instead, the Court held expressly that West Virginia substantive law would apply during the mass trial, at least in some of its crucial phases. App. 7a (West Virginia law applies to all claims against employer defendants).

The West Virginia Supreme Court also, at plaintiffs' behest, the invoked its supervisory powers to repudiate the provisions of the TSO requiring discovery prior to the mass trial. App. 15a-16a & n.18.[12] The court declined to exercise its supervisory authority to reach two of petitioners' specific challenges to the TSO: the assessment of a punitive damages multiplier prior to determination of causation or injury, and the use of a statistical matrix to establish causation and damages as to particular plaintiffs. Because the trial court had not yet "definitively" ruled on those issues, the West Virginia Supreme Court held, review would be premature. *Id.* at 15a.

The court acknowledged that Rule 26.01 and the mass trial procedure do not "perfectly address[]" the problem of asbestos litigation, and that a congressional solution would be "far preferable." App. 11a-12a. But Rule 26.01 and its implementation by the trial court "represent the judicial system's best efforts to address the unique challenges of managing this voluminous litigation, while at the same time trying to afford substantial justice to all the parties involved in a timely manner." *Id.* at 12a. The court closed by making clear that no further pretrial review would be forthcoming: "[W]e fully intend to allow the supervising judge to continue to fashion and implement various trial management plans

[12] Three days after the West Virginia Supreme Court issued its decision, Judge Gaughan amended his TSO accordingly, effectively precluding any discovery by defendants prior to the September 23 mass trial and narrowing significantly the scope of the required certifications. A later order barred Mobil from pursuing any written discovery regarding any of the plaintiffs.

without further intrusion by this Court." *Id.* at 18a.

Judge Maynard wrote separately to describe his "profound disquiet." App. 19a.[13] Citing *Amchem* and *Ortiz*, he argued that the proposed mass trial likely would deny petitioners due process – and that "some federal court will eventually tell us so." *Id.* Of particular concern was the due process problem that would be raised by application of West Virginia law to claims of "as many as five thousand" plaintiffs with "NO connection whatsoever with West Virginia" but who have "migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation." *Id.* at 22a (emphasis in original). With these reservations, Judge Maynard nevertheless concurred in the decision below, in part because he believed review would be premature, *id.* at 19a, and in part because he could see no "simple" alternative for resolution of West Virginia's asbestos claims, *id.* at 23a.[14]

REASONS FOR GRANTING THE WRIT

As this Court has made clear, regardless of the exigencies created by the asbestos-litigation crisis, courts are not authorized to abandon the fundamental rights of litigants. Here, the courts of one state – West Virginia – have undertaken to impose on rest of the nation a "legislative" solution that no legislature, state or federal, has enacted. That solution is to combine all plaintiffs and all defendants into one massive proceeding regardless of the number of parties involved, and without any attention to the particulars of any individual plaintiff or defendant – and then to apply West Virginia's

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[13] Judge Maynard reserved the right to file a concurring opinion when the West Virginia Supreme Court issued its decision on April 25, and filed his concurrence separately on July 5, 2002.

[14] After the West Virginia court issued its decision, Judge Gaughan was recused from the proceedings and replaced by Judges Booker Stevens and Arthur Recht. The trial is still scheduled to go forward in the form approved by the West Virginia Supreme Court in the opinion below.

substantive law without any analysis of whether all of those claims have the constitutionally necessary connection to the state. The Due Process Clause of the Fourteenth Amendment does not permit this unprecedented and profound distortion of the processes of civil justice.

To be exact, the Due Process Clause does not permit the joinder for a mass liability trial of thousands of disparate asbestos cases against hundreds of defendants in the absence of any inquiry into the commonality of those claims or the prejudice that would result from such an extraordinary undertaking. The decision of the West Virginia Supreme Court to dispense with any determination of commonality and prejudice directly conflicts with cases from other courts recognizing that due process and fundamental fairness require courts to determine whether common questions of law or fact permit aggregation, and whether aggregation will unduly hinder a party's right to defend itself in a multi-party proceeding.

Nor is West Virginia free simply to apply its law to all claims joined through a mass litigation rule without allowing for a determination of whether the underlying complaints have any connection to the state. On this point, the decision below is in clear conflict with decisions of this Court setting outer constitutional limits on the application of a forum's law, and also with cases from lower courts acknowledging and applying those limits.

The pre-trial and trial processes for this mass endeavor raise a number of constitutional questions of the utmost seriousness. Some of these questions are premature for this Court's review;[15] others – those raised here – are decidedly

[15] Petitioners do not now seek review, for instance, of the assessment of a "punitive damages multiplier" prior to any determination of causation or injury, or of the use of a statistical "matrix" to extrapolate findings of causation and injury. But even those provisions of the TSO have an immediate effect: hanging over the proceedings like a sword of Damocles, they help to coerce the very mass settlements that may permanently insulate them from judicial review. *See infra* at 28-30.

not premature. Indeed, for the questions in this latter category, this is the only meaningful opportunity for federal review. Post-trial review may well be impossible: the stakes may simply be too high for a defendant to proceed to a mass trial in which it will have no real opportunity to defend itself.

I. THE WEST VIRGINIA COURT'S HOLDING THAT MASS AGGREGATION FOR TRIAL REQUIRES NO INQUIRY INTO COMMONALITY OR POTENTIAL PREJUDICE CONFLICTS WITH DECISIONS OF OTHER COURTS.

Holding that Rule 26.01 is not "affected by case law interpreting various rules of civil procedure," App. 4a – including the rules governing joinder, class actions, and consolidations – the Supreme Court of West Virginia approved an aggregated trial of 8,000 plaintiffs against hundreds of defendants without subjecting it to review under any standard at all. The Court expressly held that the ordinary consolidation standard – requiring sufficient commonality to avoid an undue risk of prejudice or jury confusion – is "superseded" by Rule 26.01. But Rule 26.01 establishes no criteria of its own for aggregation of cases, nor any guidance for treatment of cases referred to the MLP. In short, the decision below not only permits, but specifically approves an entirely standardless aggregation of thousands of asbestos claims.

1. That decision is in clear conflict with decisions of the United States Court of Appeals for the Second and Fifth Circuits, and with appellate decisions in two of the nation's largest states, California and Texas. Those courts have required a judicial determination that a proposed aggregation does not combine cases so factually dissimilar that it would unduly interfere with a party's right to litigate its own claims or defenses. And, importantly, that determination is deemed necessary not only as a matter of civil procedure, on which there is room for jurisdictional differences, but as a matter of due process and fundamental fairness, on which there is not.

The Second Circuit has made clear that review of a proposed consolidation for commonality and risk of prejudice is required by the Due Process Clause. *See, e.g., Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973) (invalidating consolidation order pretrial where it would "deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result"); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (reversing consolidation of 48 asbestos cases because the "benefits of efficiency can never be purchased at the cost of fairness"). The Fifth Circuit applies the same rule. *See, e.g., In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (invalidating, pretrial, proposed trial plan in mass consolidation under Due Process Clause); *Gwathmey v. United States*, 215 F.2d 148, 155-56 (5th Cir. 1954) (consolidation precluded where deprives litigants of due process right to "fair opportunity to have [their cases] determined from the evidence in reasonable proceedings").

Appellate courts in California and Texas also have recognized that overbroad consolidations of factually dissimilar claims may contravene due process limits as well as ordinary rules of civil procedure. *See, e.g., Todd-Stenberg v. Dalkon Shields Claimants Trust*, 56 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1996) (recognizing that consolidation of disparate claims can cause confusion and prejudice to the point of depriving defendants of due process); *Union Pac. Res. Group, Inc. v. Hankins*, 51 S.W.3d 741, 749 (Tex. Ct. App. 2001) (due process violated in aggregated proceedings unless defendants have "opportunity to adequately and vigorously present any material claims and defenses").

The issue on which the decision below conflicts with these other authorities – the constitutional necessity for review of commonality and potential prejudice – has direct and important consequences. In courts in which this review is required, the result is substantial and meaningful limits on

the number and types of cases that may be consolidated for trial. Those courts routinely hold that asbestos cases may be consolidated for trial only when they involve – at a minimum – common worksites, similar occupations, similar exposure times and similar injuries. *See, e.g., Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) (analyzing and upholding consolidation of two asbestos claims for trial); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495-96 (11th Cir. 1985) (approving consolidation of four asbestos claims after concluding that workers with same injuries and same jobs were exposed within the same time frames and at many of the same job sites). It is only by forgoing that inquiry altogether, by contrast, that the court below could approve the aggregation for trial of 8,00[illegible] wildly disparate asbestos claims against 250 defendants.[16] In short, the outcome in this case would have been different had the case arisen in any of the majority of jurisdictions that recognize a due process limit on the aggregation of cases for trial.

2. This Court should grant the petition on the basis of the conflict among the lower courts alone. But it is also clear that on the merits, the court below erred in holding that state courts are free to dispense with any review for prejudice and confusion when aggregating asbestos cases.

a. States possess considerable flexibility in creating rules of civil procedure, but that flexibility is ultimately constrained by the Due Process Clause. *Hansberry v. Lee*,. 311 U.S. 32, 40-42 (1940); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) ("because minimum [procedural] re-

[16] The initial referral of all "asbestos" cases to the MLP in November of 2000 is no substitute for the standard due process inquiry. *Cf.* App. 13a (relying on initial determination that these cases can "be grouped together for trial purposes"). Contrary to the suggestion of the West Virginia Supreme Court, that one-time administrative referral did not constitute a determination that the cases would – or could, constitutionally – be litigated together in a mass trial, and accordingly did not include the appropriate review for commonality or potential prejudice and jury confusion.

quirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate") (citation omitted).[17] Of special relevance here, the Court has on several occasions invalidated state rules of civil procedure when they afford individuals affected by mass litigation inadequate protections. *See Hansberry*, 311 U.S. at 40-42; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Due process limits on state authority to aggregate cases for trial protect important interests of both plaintiffs and defendants. First, due process principles ensure that before they are bound to the outcome of a mass proceeding, plaintiffs receive notice of the action, *see Eisen*, 417 U.S. at 176, and are adequately represented at trial, *see Hansberry*, 311 U.S. at 41-42. Indeed, it was primarily concerns about the adequacy of representation – in light of substantial factual disparities among plaintiffs – that caused the Court to invalidate the proposed class-action settlements in *Amchem* and *Ortiz*. *See* 521 U.S. at 625; 527 U.S. at 856.

Though these principles apply directly to plaintiffs, defendants – like petitioners here – have an equal stake in their proper application. Defendants have an obvious interest in ensuring that any judgment in an aggregated proceeding binds all the plaintiffs in the future and, in this sense, the requirements of notice and adequate representation protect *defendants* by affording them some measure of finality at the close of a mass proceeding. *See Shutts*, 472 U.S. at 809-10 (defendants have standing to allege deficiencies in notice and representation); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

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[17] The same supremacy principle applies to state constitutional provisions. The fact that the West Virginia Constitution mandates the administration of justice without delay, *see* App. 12a (citing W. Va. Const. art. III, § 17), in other words, cannot justify expedited proceedings that fall short of the federal due process standard.

Due process limits on aggregation also safeguard the rights of defendants more directly. The commonality requirement ensures that a defendant forced to deal with several plaintiffs at once is in fact defending only against a single and narrowly presented legal situation. That precaution is doubly important in cases like this one, involving not only multiple plaintiffs but also multiple defendants. Without a careful inquiry into commonality, the proceeding may easily become so large and confusing that it is impossible for each defendant to present a meaningful defense: evidence inadmissible as to one defendant may be admitted as to others, *see Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992), and the complexity of the proceedings may make it impossible for the jury to sort through the evidence and various defenses to tailor a verdict to each party's culpability, *see Logan*, 455 U.S. at 433 (due process guarantees "the aggrieved party the opportunity to present his case and have its merits fairly judged"); *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-45 (4th Cir. 1998) (improper aggregation unfairly allows plaintiffs to litigate on behalf of composite "perfect plaintiff," combining strongest aspects of unrelated claims).

This case amply illustrates the wisdom of those constitutional limits. The single common element in the 8,000 claims massed for trial is that the word "asbestos" appears in each complaint. The thousands of plaintiffs have been "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some [plaintiffs] suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis or from mesothelioma." *Amchem*, 521 U.S. at 624 (quotation omitted); *see also* App. 22a (Maynard, J., concurring). It is obviously not the case that all 8,000 of the plaintiffs will be "actually before the court" in anything "more than a fictional sense." *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990); *see also* Richard L.

Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. Rev. 879, 892 (1995) ("consolidation can leave claimants with as little control over their cases as unnamed class members in a class action"). But there has been no inquiry – nor will there be – into whether each of these very differently situated plaintiffs will or can be adequately represented at the mass trial.

On the defendant side, the mass trial approved below will make it impossible for a defendant like Mobil to assert its unique defenses in a meaningful way. The Group I mass trial includes over a hundred defendants, each of which manufactured or distributed a different asbestos-containing product or products. Petitioner Mobil alone manufactured a number of distinct products between 1963 and 1980. Mobil's products were applied in small amounts, such as through use of a putty knife to seal cracks in coatings on boilers or to cover small nail holes. And all of Mobil's products – unlike many other defendants' – entirely encapsulated small amounts of chrysotile asbestos within other materials.[18] There is no scientific evidence that *Mobil's* products can cause asbestos-related diseases or illnesses.

Nevertheless, Mobil's liability will be assessed in conjunction with that of over a hundred other manufacturers, distributors, and alleged conspirators: those who made products

[18] The term "asbestos" – the only thing these cases have in common – actually refers to a range of minerals with significant variations among them. "Asbestos" is the name given to a whole "class of magnesium-silicate minerals that occur in fibrous form. Minerals that are included in this group are chrysotile, crocidolite, amosite, tremolite asbestos, anthophyllite asbestos and actinolite asbestos." *See* Occupational Safety & Health Standards, 29 C.F.R. § 1910.1001, App. G. (2001). "[A]sbestos products are not made from the same formula, come in various forms and carry different risks of harm." *Becker v. Baron Brothers Coliseum Auto Parts, Inc.*, 649 A.2d 613, 621 (N.J. 1994) (citing *Mullen v. Armstrong World Indus., Inc.*, 246 Cal. Rtpr. 32, 36-37 (Cal. Ct. App. 1988)); *see also Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985); *accord Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985).

before and after Mobil, those who had knowledge of the dangers of their products, and those whose products exposed workers to great risk of asbestos-related illness. Evidence concerning the alleged knowledge and conduct of all these other defendants will be admitted into the mass proceeding, where it will almost inevitably tar petitioners, as well. *Gwathmey*, 215 F.2d at 154 (cumulative effect of evidence against some defendants prejudices jury against all defendants in consolidated case). And the sheer quantity and complexity of the information that will be presented is virtually certain to overwhelm the jury, making it impossible to distinguish one defendant or defense from another and to render a fair verdict on petitioners' unique defenses. *Malcolm*, 995 F.2d at 352 (finding that "sheer breadth of the evidence" when 48 asbestos cases are consolidated makes it impossible to prevent jury confusion).[19]

b. "As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991) (state civil trials must operate "according to the settled course of judicial proceedings"); *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("It is precisely the historical practices that *define* what is 'due.'"). Against this benchmark, too, the procedure approved by the West Virginia Supreme Court comes up short.

Traditional practice in both federal and state courts is to review for commonality and prejudice before cases are aggregated for trial. *See, e.g.*, 8 James Wm. Moore, et al.,

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[19] Contrary to the West Virginia Supreme Court's supposition, this constitutional problem cannot be obviated by careful specification of the issues put to the jury at the close of the mass trial. *See* App. 15a. The problem inheres in *any* effort to have a single jury determine the "fault" of hundreds of differently situated defendants in relation to thousands of disparate plaintiffs.

Moore's Federal Practice § 42.10[4]-[5] (Matthew Bender 3d ed. 2002); *Johnson*, 899 F.2d at 1284 (reviewing cases); *In re Ethyl Corp.*, 975 S.W.2d 606, 612-15 (Tex. 1998) (same); *Glussi v. Fortune Brands, Inc.*, 714 N.Y.S.2d 516, 518 (N.Y. App. 2000) ("[W]here prejudice to a substantial right is shown . . . a joint trial should not be granted even if common issues of law or fact exist."). And in asbestos cases specifically, common practice is to aggregate "five or fewer claims at a time" – and those only on a stringent showing of common or similar worksites, occupations, periods of exposure, alleged injuries, and the like. *In re Ethyl Corp.*, 975 S.W.2d at 612. Federal courts – and the majority of state courts that model their rules after the Federal Rules of Civil Procedure – agonize about the consolidation of two, *Johnson*, 899 F.2d at 1285, four, *Hendrix*, 776 F.2d at 1495-96, thirteen, *Cain*, 785 F. Supp. at 1451, and even twenty-two, *In re Ethyl Corp.*, 975 S.W.2d at 615-17, asbestos claims for trial. A consolidation for trial of *8,000* claims against *250* defendants "so departs from [the] accepted norm as to be presumptively violative of due process." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993) (plurality opinion).

The decision below also departs from traditional practice by approving a method of aggregation – what the court below termed "conjoin[der]," App. 10a – that is otherwise unknown to civil litigation. Indeed, the West Virginia Supreme Court expressly held that this mass trial proceeding is unconstrained by any of the traditional state rules that govern aggregations, *see supra* at 9 – apparently without considering whether these traditional ways of proceeding might now set the constitutional baseline. *See Oberg*, 512 U.S. at 430 ("abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause").

Traditionally, consolidation may not operate to abridge the rights that parties would have if their cases proceeded

separately. *See Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) (consolidation does not "merge the suits into a single cause, or change the rights of the parties"); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 808 F.2d 133, 135 (D.C. Cir. 1987); *In re TMI Litig.*, 193 F.3d 613, 724-25 (3d Cir. 1999). But the "conjoinder" approved below clearly alters the substantive rights of the parties: all "asbestos" claims are automatically referred to the MLP, and defendants are denied any opportunity to conduct standard discovery necessary to file standard pretrial motions (i.e., motions challenging venue or motions for summary judgment) in order to weed out frivolous or non-meritorious claims.

Departures from prevailing practice and traditional rules should be particularly suspect in this context. In cases ranging from *Hansberry* to *Amchem* and *Ortiz*, this Court has recognized the critical importance of the traditional protections that attend class-action aggregations. Those protections will be rendered meaningless if state procedural innovations, like the West Virginia "conjoinder," operate unchecked by traditional aggregation rules and standards. Whatever the label affixed by the state, a mass aggregation that implicates the rights of plaintiffs to adequate representation and the rights of defendants to a fair opportunity to defend should be accompanied by the traditional protections – including the standard judicial inquiry into commonality and risk of prejudice and jury confusion. *See, e.g.*, Joan Steinnman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1042 (1993) (noting concern that mass consolidations lack the "procedural safeguards that due process and codified rules demand in class actions of similar magnitude").

II. THE WEST VIRGINIA COURT'S CHOICE-OF-LAW HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS.

Petitioners argued below that without pretrial discovery, defendants have no opportunity to prove that West Virginia

law may not be applied to thousands of claims with no connection to the state. Without addressing this argument directly, the West Virginia Supreme Court held that West Virginia law will be applied to determine the fault of at least one group of defendants. App. 7a. Justice Maynard, on the other hand, focused extensively on the constitutional problems raised by any effort to apply forum law to all of the claims at issue, thousands of which have no meaningful connection to West Virginia. *Id.* at 21a-22a ("All the due process arguments are compelling, but this [choice-of-law] is the due process claim about which I am most fearful of eventual reversal.").

1. The choice-of-law decision below conflicts with the express dictates of this Court, as well as with the decisions of lower federal courts applying those rulings. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 815 (1985), this Court held that the mere fact that a defendant does business in a state does not justify application of that state's law to claims that have no other "apparent connection" to the state. Instead, a state may apply its law consistent with the Due Process Clause only if it has a "significant" connection to the claims asserted by *each* plaintiff – even in the context of a nationwide class action, in which it "may be more difficult or more burdensome to comply with [these] constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum." *Id.* at 821-22. *See also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (plurality opinion) ("if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional" under Due Process Clause).[20] As Justice May-

[20] Constitutional provisions other than the Due Process Clause also limit a state's ability to regulate or proscribe conduct having no relationship to that state. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion) (Dormant Commerce Clause); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (same); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996) ("principles of state

nard put it in his concurring opinion, "The United States Supreme Court has established that, as a matter of due process, a state cannot categorically apply its substantive law to govern claims in which [it] has little or no interest." App. 21a.

The decision below, forgoing any inquiry into the existence of contacts sufficient to justify application of forum law, cannot be reconciled with the precedent of this Court. *See* App. 22a (Maynard, J., concurring) ("Because so many of the plaintiffs have NO connection whatsoever with West Virginia, and because the United States Supreme Court was so clear in the *Phillips* case, I just don't see how the trial court can tread safely through this judicial minefield."). Not surprisingly, it also conflicts with decisions from lower courts faithfully applying this Court's case law. In aggregated proceedings in which injuries have accrued nationwide, courts routinely engage in an "individualized choice of law analysis" with respect to each plaintiff's claims, *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom., Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and apply forum law only if they can confirm that each claim has the necessary "significant contact" with the forum state, *see Nicolet, Inc. v. Superior Court*, 224 Cal. Rptr. 408, 414-15 (Cal. Ct. App. 1986) (applying due process choice-of-law analysis to individual claims); *Hime v. State Farm Fire & Casualty Co.*, 284 N.W.2d 829, 831-32 (Minn. 1979) ("slight and casual" contacts insufficient to justify application of forum law consistent with due process); *see also McBride v. Galaxy Carpet Mills, Inc.*, 920 F. Supp. 1278, 1285 (N.D. Ga. 1995) (*Phillips* requires application of law of state in which each plaintiff resides, rather than forum law).

The failure of the West Virginia Supreme Court to engage in an analysis of "significant contacts" under *Phillips* has dramatic consequences for this case. Thousands of the

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sovereignty and comity" dictate "that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other states").

claims at issue involve plaintiffs who reside in *and* were allegedly exposed to asbestos in states other than West Virginia. *See* App. 21a (Maynard, J., concurring) ("as many as five thousand of the plaintiffs included in the [] mass trial are not West Virginia residents and were never exposed to asbestos in this State").[21] Even Judge Gaughan has recognized as much, taking "judicial notice" of the fact that "there is a long history of massive filings on behalf of non-West Virginia residents having no exposure to asbestos in West Virginia." Order on Certain Defendants' Motions to Dismiss Out-of-State Plaintiffs, May 6, 2002, at 4. Even a cursory analysis under *Phillips* would have made plain the constitutional impossibility of applying West Virginia law to these claims. *See Georgine*, 83 F.3d at 627.

Nor could the constitutional problem be avoided by postponing until trial a determination of what law should be applied.[22] The 8,000 plaintiffs in this case reside in and were allegedly exposed to asbestos in as many as 35 different states. Whenever the *Phillips* inquiry is undertaken, it will result in application of the laws of all or most of those various states – making a mass trial of all 8,000 claims even more confusing and unmanageable, and hence unconstitutional, than it otherwise would be. *See, e.g., In re Bridge-*

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[21] Because no discovery of plaintiffs has been permitted, it is impossible to identify the precise number of plaintiffs without connection to the state.

[22] In fact, of course, the West Virginia Supreme Court already has expressly approved application of West Virginia law at trial, at least as to some defendants. And all defendants are currently held to West Virginia law with respect to substantive pretrial motions and defenses. For instance, under the laws of many of the states in which plaintiffs reside, a defendant could prevail on summary judgment unless each plaintiff could make a sufficient showing that he or she was exposed to the particular defendant's products. *See, e.g., Lohrman v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986) (Pennsylvania law). That state-law standard has been replaced here by West Virginia law, which allows cases to proceed directly to trial even in the absence of such a showing.

stone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002) (Easterbrook, J.) (commonality inquiry screens for situations in which "claims must be adjudicated under the law of so many jurisdictions" that aggregated treatment becomes impossible). Indeed, this seems to be precisely the scenario that Justice Maynard had in mind when he expressed his considerable doubt that a mass trial could be held consistent with *Phillips* and the Due Process Clause. App. 21a-22a.

2. The question of whether and under what circumstances a state may apply its own law to cases that accrue throughout the nation is exceptionally important. Without some limit on a state's authority to apply its own law, particular state courts can become magnets for resolution of critical national issues. The result is the worst kind of forum-shopping – and effective authorization for those states to impose their policy choices on the rest of the country.

State product-liability laws reflect fundamental decisions about how best to protect citizens from defective products, regulate the state economy, and structure the judicial system. There is no reason to think that one state's policy judgments will be the same as or consistent with those of other states. West Virginia, for instance, is among the distinct minority of states that has retained the doctrine of pure joint and several liability in product-liability cases. *See Board of Ed. v. Zando, Martin & Mistead, Inc.*, 390 S.E.2d 796, 799 (W. Va. 1990). That is West Virginia's prerogative. The problem arises when West Virginia seeks to apply its own law to claims that arise exclusively in other states – states that have rejected pure joint and several liability as fundamentally unfair to defendants. *See, e.g., Teepak, Inc. v. Learned*, 699 P.2d 35, 39 (Kan. 1985) ("There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss.").[23]

[23] This Court recently granted review in *Norfolk & Western Railway Co. v. Ayers*, Nos. 92-C-5829, 93-C-7004, 93-C (Cir. Ct. Kanawha Cty.,

Joint and several liability is just one example; there are countless other aspects of product-liability law and policy that differ substantially from state to state. *See* Robert Rabin, *Federalism and the Tort System*, 50 Rutgers L. Rev. 1, 9-10 (1997) (describing conflicting state policy choices regarding premises' owners liability, comparative fault, liability for emotional distress, and foreseeability). West Virginia should not be permitted, through mass proceedings like the one approved below, to impose its policy preferences on thousands of claims with no meaningful connection to the state. Whatever efficiencies might result would be far outweighed by the cost to fundamental principles of federalism. *See In re Bridgestone/Firestone*, 288 F.3d at 1020 ("Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.").

III. IMMEDIATE REVIEW BY THIS COURT IS BOTH APPROPRIATE AND NECESSARY.

The fact that one or a few state courts have adopted a legal standard that conflicts with the law in other courts does not always warrant immediate Supreme Court review. But this case does. In combination, the two holdings below – allowing mass aggregation of claims without any review for commonality and potential prejudice, and allowing for wholesale application of West Virginia law – mean that a single state jurisdiction may become the repository for enormous numbers of cases arising throughout the nation. Indeed, West Virginia is well on its way to becoming just such a magnet for mass filings – making it increasingly unlikely that other states will ever face the same issues raised here. Under these circumstances, even a single outlier state can have nationwide impact, and even a relatively one-sided con-

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W. Va.), *cert. granted*, __ U.S. __, 122 S. Ct. 1434 (2002) (No. 01-963), in part to consider the closely related question of whether West Virginia properly applies its own state-law rule of joint and several liability to claims arising under the Federal Employers' Liability Act.

flict requires resolution by this Court.

The two precise questions raised by petitioners are fully ripe for review by this Court. The Supreme Court of West Virginia has approved a standardless aggregation of thousands of claims for trial without any inquiry into commonality or potential prejudice, and it has decided to apply West Virginia law without engaging in a *Phillips* choice-of-law analysis. These two questions are cleanly and squarely presented by the holdings of the West Virginia Supreme Court, and no further factual development is required. And though petitioners have made every effort to obtain relief from the West Virginia courts, the West Virginia Supreme Court has held that it will not revisit these two questions, App. 18a, leaving review by this Court as the only remaining avenue for protection of petitioners' fundamental rights.

There is no question but that the decision below is a "final" decision over which this Court has jurisdiction under 28 U.S.C. § 1257. A petition for a writ of mandamus or a writ of prohibition filed before the highest court of a state is a "distinct lawsuit that is 'fully and finally determined' even if 'further proceedings are to be had in the lower court.'" *Board of Educ. v. Super. Ct.*, 448 U.S. 1343, 1345-46 (1980) (quoting *Fisher v. Dist. Ct.*, 424 U.S. 382, 285 n.7 (1976)); *see also Madruga v. Super. Ct.*, 346 U.S. 556, 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257.").

Finally, though interlocutory review is generally disfavored as a prudential matter, that presumption does not apply when postponing review might be the equivalent of denying review altogether – when, that is, "crucial collateral claims" might be lost if they are not reviewed immediately. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *see also Local 438, Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963). This is just such a case.

Post-trial review of mass aggregations is effectively unavailable, as the "paucity of appeals challenging trial settings of multiple [consolidated] claims" attests. *In re Ethyl Corp.*, 975 S.W.2d at 610-11. Given the enormous potential liability that mass aggregations pose for defendants, combined with scrutiny from financial markets, aggregated proceedings exert powerful pressure on defendants to settle even meritless cases. Aggregation may raise the stakes of litigation to the point where a defendant simply cannot risk trial, regardless of the merits, thus opening the door to what are effectively "blackmail" settlements. "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (same); Fed. R. Civ. P. 23(f), advisory committee notes (providing for interlocutory review of class certification decisions because certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

The settlement pressure exerted by mass aggregation is especially pronounced when – as in this case – the underlying claims assert potentially serious personal injuries. In *In re Chevron*, which involved an aggregation of 3,000 personal-injury claims against a single defendant, the Fifth Circuit concluded that the decision to aggregate would "probably not [be] effectively reviewable after trial. The pressure on the parties to settle in fear of the result of a perhaps all-or-nothing . . . trial is enormous." 109 F.3d at 1022. Outside observers increasingly agree. *See, e.g., The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Committee on the Judiciary*, 106th Cong. (July 1, 1999) (Prof. William N. Eskridge, Yale Law School) ("Especially in state courts, defendants in the typical [asbestos] jumbo consolidation now face an Armageddon scenario if they do not settle on terms favorable to

plaintiffs.").

And those are just the settlement pressures exerted by the standard mass aggregation. The pressure for settlement here is made even more intense by the ever-present threat of especially Draconian measures like "punitive damages multipliers" assessed against defendants even before they are shown to have caused any injury, and findings of ultimate liability based not on trial but extrapolation from a statistical matrix. Such measures are, to put it mildly, of dubious constitutionality. But so long as they remain on the table – and the West Virginia Supreme Court has kept them there, by refusing to use its robust "supervisory" power to evaluate their permissibility – they inevitably work to extort pretrial settlements.

Indeed, all of the parties to the West Virginia litigation fully understand the coercive pressures at work. Lawyers for the plaintiffs argued against Judge MacQueen's original small-group trial plan on the express basis that it would not impose "enough leverage on [defendants] to cause them to settle a thousand cases." *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha Cty., W. Va. March 16, 2001), Transcript of Hearing at 72-73 (statement of James F. Humphrey). The West Virginia courts themselves have relied on the certainty that the planned mass trial will provoke mass settlements – in order to explain why the mass trial will not be as hopelessly sprawling and confusing as it now appears. *See* App. 5a. It is one thing to take account of the possibility of settlements driven by external factors in planning an aggregated trial. But it is something else entirely when the anticipated settlements are driven by the mass trial proceeding itself, so that the coercive nature of a mass trial becomes its own justification.

As a practical matter, this may well be the only opportunity defendants like petitioners will have to bring their claims before the Court. It may also be the Court's best opportunity to clarify the limits imposed by the Due Process Clause on mass aggregations in state courts. Under circumstances like

these, immediate review is entirely appropriate. Indeed, it is essential.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

No. 30314

STATE OF WEST VIRGINIA EX REL. MOBIL CORPORATION; CCX, INC.; DRAVO CORPORATION; GREAT LAKES CARBON CORPORATION; GREEN TWEED & COMPANY, INC.; LIMBACH, INC.; PITTSBURGH METALS PURIFYING COMPANY; PLIBRICO COMPANY; ROBERTSON CECO CORPORATION; SEEGOTT, INC.; ZURN INDUSTRIES; GENERAL ELECTRIC COMPANY; MONSANTO COMPANY, NKA PHARMACIA CORPORATION; COMBUSTION ENGINEERING, INC.; CERTAIN DEFENDANTS AND CERTAIN PREMISES AND EMPLOYER DEFENDANTS; FORD MOTOR COMPANY; DAIMLER CHRYSLER CORPORATION; AND GENERAL MOTORS CORPORATION, Petitioners

v.

HONORABLE MARTIN J. GAUGHAN, IN HIS CAPACITY AS A JUDGE/SPECIAL APPOINTEE OF THE WEST VIRGINIA MASS LITIGATION PANEL; AND ALL PLAINTIFFS IN THE CASE STYLED IN RE: ASBESTOS LITIGATION, CIVIL ACTION NO. 01-C-9000, KANAWHA COUNTY, Respondents

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PETITION FOR A WRIT OF PROHIBITION AND/OR MANDAMUS

WRIT DENIED

Submitted: April 2, 2002
Filed: April 25, 2002

The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE DAVIS, deeming herself disqualified, did not participate in the decision of this case.
JUDGE JOHN T. MADDEN, sitting by temporary assignment.
JUSTICE MAYNARD concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Per Curiam:

Petitioner Mobil Corporation[1] seeks extraordinary relief from a February 26, 2002, Trial Scheduling Order[2] entered by the Circuit Court of Kanawha County, entered in connection with certain asbestos-based personal injury cases that have been amassed under West Virginia Trial Court Rule ("TCR") 26.01. Mobil argues that the procedures contemplated by the lower court in connection with bringing the asbestos cases to trial will, as a matter of certainty, result in a denial of its Due Process rights if trials ensue under the outlined, but as yet unfinalized, trial procedures. Upon our full review of this matter, we do not find that Mobil has met the requirements for entitlement to either a writ of prohibition or a writ of mandamus. Accordingly, the requested writs for extraordinary relief are hereby denied; however, due to the inherent complexities involved with the management of these asbestos cases, we proceed to set forth certain observations and cautionary concerns for the trial court's consideration and use.

I. Procedural Background

This matter arises in connection with the grouping of presumably several thousands[3] of asbestos personal injury

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[1] Various other defendants have joined with Mobil in seeking relief from the trial court's orders of September 6, 2001, and February 26, 2002, relative to both pre-trial and trial matters.

[2] At the time Mobil filed its petition, the Trial Scheduling Order had not yet been entered. Mobil was initially seeking relief from the September 6, 2001, Report of the trial court relative to this litigation.

[3] Consistent with our earlier observation in *Allman*, we are "uncertain as to the exact number of plaintiffs included in the litigation below." 209 W.Va. at 728 n. 1, 551 S.E.2d at 371 n. 1. During oral argument of this matter, however, one of plaintiffs' counsel represented to the Court that the trial group currently is made up of 7,715 cases if the FELA cases are included, and 5515, if those cases are excluded.

claims under the provisions of TCR 26.01. In addition to addressing the propriety of these cases proceeding under TCR 26.01 in *State ex rel. Allman v. MacQueen*, 209 W.Va. 726, 551 S.E.2d 369 (2001), we outlined a fourteen- point directive for the trial court in connection with the management of these cases. *See id.* at 732-35, 551 S.E.2d at 375-378. However, before those directives could be fully implemented, Mobil sought relief from this Court[4] in connection with the trial court's intent to use a mass trial format, the prospective application of various trial groupings, and the use of certain measures for calculating damages. Much of the relief sought by Mobil was previously considered and rejected in the *Allman* decision. For example, Mobil previously raised the argument, which we rejected, that both Rule 42 of the West Virginia Rules of Civil Procedure and the cases construing that rule were controlling. *See Allman,* 209 W.Va. at 731, 551 S.E.2d at 374 (noting that "[b]ecause the provisions of TCR 26.01 control the underlying civil action, we do not view this matter as one affected by case law interpreting various rules of civil procedure, including Rules 20, 23, or 42, which respectively address issues of joinder, class action, and consolidation").

At the time Mobil filed its petition for relief in late December 2001, the only ruling that had been issued by Judge Gaughan was a "Report," which was entered on September 6, 2001. As an initial matter, Judge Gaughan concluded that "because of the very complicated intertwining of plaintiffs' attorneys, multiple defendants and their defense attorneys, varying exposures to asbestos and different theories of liability, it is futile to continue to pursue small all-issues trials over a long period of time as contemplated by the current

[4] Mobil filed its motion seeking extraordinary relief on December 21, 2001, and we issued a rule to show cause on January 23, 2002.

trial schedule."[5] After discussing the use of mediation to resolve these cases and indicating that mediation would be addressed through a separate order[6] and would be scheduled to occur between October 1, 2001, and March 4, 2002,[7] Judge Gaughan provided for a June 24, 2002, mass trial date. Under the trial plan described in the Report, three judges and three juries would be convened for the purpose of resolving "issues that are common to all or almost all of the parties." Following this initial phase of trying common issues, the trial court contemplated at the time of the September 6, 2001, Report that "additional juries w[ould] be picked to try the issues of exposure/causation and damages." Based on the history of previous mass trials, Judge Gaughan anticipated that "through the elimination of parties during the mediation and the jury trial process . . ., the number of litigants would be drastically reduced within two months of the initial verdict on liability." At such time, the trial court speculated that it might attempt to use a damage matrix for purposes of the un-

[5] The "current trial schedule" referenced by Judge Gaughan was the schedule originally set by Judge MacQueen with certain modifications indicated by this Court through our decision in *Allman*.

[6] Judge Gaughan entered two additional orders on September 6, 2001, each of which concerned mediation of the asbestos cases pursuant to Trial Court Rule 25. A separate order governed the "railroad" asbestos cases, while all other asbestos personal injury claims were subject to a general order of mediation. Under the general mediation order, the plaintiffs were directed to submit within 120 days of the order's entry certain information to the asbestos registry or be barred from participating in the mediation process outlined in the September 6, 2001, mediation order. The information required for the registry was essentially identifying information relative to an individual's work and health history, as well as product identifying information concerning the respective plaintiff's exposure history.

[7] This Court is unaware of how many, if any, asbestos cases were resolved through the mediation process.

resolved cases.[8] Appreciative of both the potential unworkability of or the need to completely discard the matrix concept, Judge Gaughan stated that "it is the intention of the Court to continue to try cases to jury verdict until there are no unresolved trials." After discussing the use of a unified numbering system for documents and a method for dealing with previously-ruled upon motions, Judge Gaughan ended the Report by observing that "the trial plan has not been solidified."[9]

In late December 2001, Mobil sought relief from this Court based on the approach outlined by Judge Gaughan in the September 6, 2001, Report. Mobil asked this Court to vacate the September 6, 2001, ruling on the grounds that the trial court's decision to "consolidat[e] thousands of unrelated individual asbestos personal injury claims into a single trial was arbitrary and capricious" and that such decision denied Mobil its right to Due Process and Equal Protection. Mobil challenged the trial court's refusal to conduct evidentiary hearings on the issue of whether these claims could be grouped together and still provide a fair determination of the issues presented, as well as the contemplated use of a punitive damage matrix. Mobil further alleged that the trial court was thwarting its "efforts to secure review" by "failing to set forth specifically the procedures to be used in the consolidated trial."

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[8] See *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (upholding use of statistical matrix for damage calculations on Due Process challenge).

[9] Judge Gaughan further indicated in the September 6, 2001, Report that it was "intention to continue to work with Judge MacQueen and others experienced in the trial of asbestos litigation to develop a process which will eliminate the need for repetitive discovery depositions, interrogatories, requests for admissions, etc."

In response to Mobil's request for relief and the rule to show cause, Judge Gaughan issued the February 26, 2002, Trial Scheduling Order. In that order, the trial court further developed some of the ideas outlined in the September 6, 2001, Report. To illustrate, the trial court provided additional details regarding the format to be used at the September 23, 2002, trial.[10] Three simultaneous trial groupings are to proceed simultaneously, with the object of determining issues solely related to the fault of the various defendants. The trial groupings represent, in generalized fashion, the various causes of action alleged by the plaintiffs: (1) product liability claims; (2) premises liability claims; and (3) deliberate intent causes of action asserted under West Virginia Code § 23-4-2 (1994) (Repl.Vol.1998). The scheduling order indicates that interrogatories will be submitted to the three juries to permit individualized findings of liability for each defendant. After the liability trials have been completed, new juries will be selected for mini-trials that will be convened to resolve issues of causation and damages. Under the plan outlined in the scheduling order, an unspecified number of plaintiffs will be involved in the mini-trials "against their common defendants." The trial scheduling order further provides that the "preferred manner of addressing the causation and damages issues will be to break down into manageable groups based on causes of action, geographic locations, and similar exposure criteria." At the start of the mini-trials, each trial judge will read the verdict form from the liability trials, including all special interrogatories, and the jurors will be advised that they are bound by those findings of liability, leaving for their resolution issues solely involving causation and damages. With regard to the possible use of a matrix, Judge

[10] The earlier selected mass trial date of June 24, 2002, was postponed due to the complexities involved in getting these matters to trial.

Gaughan indicated that "a workable plan for utilizing a matrix is not before the court, and there is no need to take evidence on the use of a matrix until at least the scheduling conference for the causation and damages mini-trials."[11]

Mobil seeks relief both from the September 6, 2001, Report and from the February 26, 2002, Trial Scheduling Order.

II. Standard of Review

While Mobil styled its petition alternatively as either a writ of prohibition or a writ of mandamus, we choose to treat the petition as a writ of prohibition given the nature of the relief sought by Mobil. Our standard of review for writs of prohibition that do not involve issues of jurisdiction was announced in syllabus point four of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impres-

[11] The trial court further stated that by the time of the scheduling conferences for the mini-trials it anticipated that it would "be able to ascertain the necessity of implementing such a matrix based on the type of cases and the number of plaintiffs and defendants remaining in the action."

sion. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Against these principles, we consider whether the relief sought by Mobil meets these standards for issuance of a writ of prohibition.

III. Discussion

A. Ranson Findings

We first address the procedural argument that Mobil reasserts in contending that the lower court has committed error by not making certain findings that are commonly referred to as the *Ranson* findings.[12] Although this Court clearly rejected this argument in *Allman,* we take this opportunity to discuss why *Ranson* findings are not required in matters proceeding under TCR 26.01. *See Allman,* 209 W.Va. at 731,

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[12] "The trial court, when exercising its discretion in deciding consolidation issues under W.Va.R.Civ.P. 42(a), should consider the following factors: (1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy; (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives. When the trial court concludes in the exercise of its discretion whether to grant or deny consolidation, it should set forth in its order granting or denying consolidation sufficient grounds to establish for review why consolidation would or would not promote judicial economy and convenience of the parties, and avoid prejudice and confusion." *Syl. Pt. 2, State ex rel. Appalachian Power Co. v. Ranson,* 190 W.Va. 429, 438 S.E.2d 609 (1993).

551 S.E.2d at 374. When we ruled upon the petition seeking extraordinary relief in *Allman*, we determined that our jurisdiction to address the issues raised therein concerning a litigation management plan issued in connection with these same asbestos cases arose by virtue of "our constitutional supervisory power over the court system as a whole." *Id.* We chose to address the issues raised in *Allman* under those general supervisory powers due to the "absence of any explicit judicial review provided under TCR 26.01 for matters that are proceeding under the mass litigation provisions set forth in that rule." *Id.*

Unlike the earlier asbestos cases that were tried *en masse* in Kanawha and Monongalia Counties, and are known as Kanawha Mass I-IV and Mon. Mass I and II, the procedural posture of *Allman* was unique in that the cases were not combined as a result of the provisions of Rule 42 of the West Virginia Rules of Civil Procedure. Because the earlier tried mass asbestos cases preceded the promulgation of TCR 26.01, which went into effect on July 1, 1999, those cases proceeded under traditional principles of consolidation pursuant to the provisions of Rule 42. In marked contrast to those previously consolidated asbestos cases, the cases involved in *Allman* were combined under the authority of TCR 26.01. To invoke TCR 26.01, Judge MacQueen and the Honorable Arthur M. Recht submitted petitions to this Court in which the grounds for grouping the cases together as "mass litigation" under the rule were fully set forth. Upon review of those grounds and upon satisfaction that the cases had the necessary criteria for proceeding under the provisions of TCR 26.01, then Chief Justice Maynard entered an order on November 17, 2000, granting the request to conjoin these cases under the mass litigation trial court rule.

To fully understand the genesis of TCR 26.01 requires an

appreciation of the fact that the earlier mass asbestos cases - Kanawha Mass I-IV and Mon. Mass I and II - gave both the trial courts involved in those cases, as well as this Court, insight into the unique considerations that arise with mass tort suits involving common factual scenarios and/or theories of causation. *See State ex rel. Appalachian Power Co. v. MacQueen*, 198 W.Va. 1, 5, 479 S.E.2d 300, 304 (1996) (noting that due to Congressional lack of action, the courts have been forced "to adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation that seem to be paralyzing their active dockets"). Through the experience of those earlier cases, various constructs emerged regarding how to balance the right of the parties to have access to the judicial system in a reasonably prompt fashion without simultaneously grinding the court system to a halt to the detriment of all other matters. *See, e.g., id.* at 5 n. 8, 479 S.E.2d at 304 n. 8 (discussing alternative management techniques employed by state and federal courts for asbestos litigation). Perhaps the most important lesson that was learned from those earlier mass asbestos cases is that the management of these cases cannot be accomplished without granting the trial courts assigned to these matters significant flexibility and leeway with regard to their handling of these cases. *See id.* at 6, 479 S.E.2d at 305 (recognizing importance of granting trial courts "broad authority to manage its docket with regard to asbestos cases"). A critical component of that required flexibility is the opportunity for the trial court to continually reassess and evaluate what is required to advance the needs and rights of the parties within the constraints of the judicial system. Out of this need to deal with "mass litigation" cases in non-traditional and often innovative ways, TCR 26.01 was drafted and adopted.

While we do not suggest that TCR 26.01 perfectly ad-

dresses the entirety of the issues that arise in conjunction with the handling of mass litigation claims,[13] we conclude that this rule, as well as the implementing efforts of the trial courts and this Court, represent the judicial system's best efforts to address the unique challenges of managing this voluminous litigation, while at the same time trying to afford substantial justice to all the parties involved in a timely manner. We further observe that TCR 26.01, by sanctioning mass litigation, seeks to meet the constitutional mandate of administering justice without delay. *See* W.Va. Const. art. III, § 17. As many courts and commentators agree,[14] it would have been far preferable for Congress to have authorized the development of a compensation system for asbestos claims that could have, in an administrative manner similar to the workers' compensation system or federal black-lung cases, addressed redress for victims of asbestos exposure and injury, at least in the first instance. Due to the lack of any such alternate recovery mechanism, however, the state and federal judiciaries throughout this country have been forced, by default, to accept the "managerial nightmare" of dealing with, or being inundated by, an inestimable and seemingly endless number of asbestos cases. *Allman*, 209 W.Va. at 731, 551 S.E.2d at 374.

While we recognized in *MacQueen* that the trial court's latitude in managing asbestos cases was to be "controlled

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[13] Nor do we think that any one rule could both contemplate and effectively address all the potential issues that arise with mass litigation.

[14] See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (stating that asbestos litigation "calls for national legislation"); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (recognizing that in 1991 the Judicial Conference Ad Hoc Committee on Asbestos Litigation had called for "federal legislation creating a national asbestos dispute-resolution scheme").

only by measuring that authority against the four part test of *Ranson*," the adoption of TCR 26.01 has effectively superceded the requirement that the *Ranson* factors be used in all mass trial cases, especially where, as here, the cases proceed independent of the consolidation mechanisms set forth in Rule 42.[15] 198 W.Va. at 6, 479 S.E.2d at 305. In seeking to have the trial court go back and make *Ranson* findings, Mobil overlooks the fact that the purpose of those findings was only to make the *initial* determination of whether the cases should be grouped together for trial purposes. With the adoption of TCR 26.01, the determination of the need to group cases as "mass litigation" for trial purposes is made through a process that operates in a fashion distinct from the steps previously specified in *Ranson*. Intrinsic to the adoption of TCR 26.01 and its use is an initial finding by this Court of both the need to group cases as "mass litigation" for trial purposes and the appropriateness of conjoining the cases for trial purposes based upon common factual and/or legal issues. Because this Court has previously approved the treatment of the current asbestos cases under the mass litigation rule, there is no reason to reexamine whether these cases should have been grouped together in the first instance. We are long past the initial determination, which was reached by this Court in November 2000, that these cases can, based on the existence of common factual and/or legal issues, be grouped together for trial purposes. Accordingly, we reject Mobil's contention that the trial court is required to make *Ranson* findings[16] in this case before it proceeds further.

Like our consideration of the petition in *Allman*, our re-

[15] See W.Va.T.C.R. 26.01(g) (providing that TCR 26.01 does not "affect the authority of a circuit judge to act independently under the provisions of" Rule 42).

[16] See supra note 13.

view of Mobil's petition arises in connection with our constitutional authority to supervise the court system as a whole. *See Allman*, 209 W.Va. at 731, 551 S.E.2d at 374. And, while we agree with the recognition in *MacQueen* that trial courts must have broad latitude in managing these asbestos cases, we emphasized in *Allman* that the trial court's actions must reflect consideration of and be in accord with the procedural and substantive due process rights of the parties. *See* 209 W.Va. at 730, 551 S.E.2d at 373. Accordingly, our consideration of the issues raised in Mobil's petition is driven by an overarching concern that the trial court's management of these asbestos cases does not operate in a fashion inimical to the parties' Due Process rights and basic notions of fundamental fairness. *See id.*

B. Trial Scheduling Order

We have carefully reviewed Judge Gaughan's February 26, 2002, order, which is designed to bring these cases to trial over the next few months through the use of the above-discussed bifurcated process. We wish to make clear that Judge Gaughan's decision to enlarge the time frame for trying these cases that we set out in *Allman* was well-justified. *See* 209 W.Va. at 733-34, 551 S.E.2d at 376-77. We consider the adjustment of the time frame to be in accord with our instruction in *Allman* that the trial court should organize and bring these cases to trial with appropriate concern for fundamental fairness and Due Process. *See* 209 W.Va. at 730, 551 S.E.2d at 373. In that same spirit, we observe that the trial court has authority to make additional time frame modifications to the February 26, 2002, scheduling order as it deems necessary and/or required to meet the legitimate needs of the parties, provided that such alterations do not thwart this Court's concern that these cases be resolved in as prompt a fashion as possible to meet the Constitutional directive of

administering justice "without . . . delay." W.Va. Const. art. III, § 17.

The trial court's decision to begin the bifurcated trial process by initially resolving issues of liability and subsequently convening "mini-trials" to address the remaining issues of causation and damages is consistent with past mass trial practices in this state. Because the trial court has yet to finalize the specifics regarding identification of the common issues that will be the focus of the initial liability phase of the litigation, Mobil's contention of a denial of Due Process predicated on the lack of commonality of the issues subject to the liability phase is simply premature. We cannot, in advance of any such final determination of these common issues, resolve Mobil's speculative, and possibly unrealized, claims of Due Process violations.

Likewise, we cannot substantively address Mobil's concerns regarding the potential use of a matrix, or a punitive damage multiplier, because the trial court has not yet definitively ruled upon the use of either of these mechanisms. Accordingly, any consideration of these issues at this time would be clearly premature. The trial court's announcement to postpone, for the time being, any decision regarding the potential use of a matrix underscores the precipitous nature of ruling on this issue at this juncture. Matters such as a matrix and the use of a punitive damage multiplier, given the unresolved nature of the use of such mechanisms, can be better addressed by this Court upon appeals taken from final orders.

We perceive that the trial court will recognize and accommodate the legitimate limitations of the parties with regard to strict adherence to various parts of the scheduling order and will make certain adjustments to the time periods

specified in the current order.[17] For example, discovery deadlines may need to be adjusted to reflect both the realities of scheduling logistics and the need to focus initially on obtaining information pertinent to the common issues phase of the litigation with subsequent discovery permitted, as needed, to obtain more complete information necessary for the remaining phases of the litigation.[18] We feel certain that the trial court will consider all proper requests for modifications to the scheduling order, without losing sight of the objective to timely resolve as many asbestos claims as reasonably possible while at the same time ensuring that appropriate measures are undertaken during both the pre-trial and the trial stages of this litigation to extend basic guarantees of fairness to all the parties.

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[17] For example, the scheduling order in effect required that the plaintiffs "certify" certain detailed information relative to their claim and injury or risk the dismissal with prejudice of their claims. That date for certification has passed and, to this Court's knowledge, no claims have been dismissed pursuant to that order. Just as modifications to the certification requirements may need to be imposed, the trial court may also need to modify its temporal restrictions pertaining to the discovery deadline imposed on the defendants regarding product identification and the correlative sanction of precluding the admission of certain evidence.

[18] In this Court's opinion, it would be prudent to consider, upon proper request from the parties, a restructuring of the discovery process as a whole to more accurately match the need for obtaining information to the particular phase of the litigation. By better tailoring the discovery process to the respective phases of the litigation, it may be possible to somewhat curtail the resulting time and financial burdens imposed on the parties by requiring the completion of all-phases discovery before the common issues phase of the litigation has commenced. In this same vein, we observe that sanctions relative to discovery, if any, might best be addressed at the appropriate point in the trial process to which the discovery relates and should not be prematurely considered prior to the time at which such information is required.

It is this Court's perception that the trial court has listened carefully to requests raised from both the plaintiffs and the defendants below concerning the need to consider various amendments to the February 26, 2002, scheduling order. We are confident that the trial court will continue to accommodate the genuine concerns raised by the litigants[19] and give proper consideration to matters involving exigent circumstances, as they arise. We strongly caution the parties to limit their requests for scheduling modifications to matters involving legitimate need, being careful not to inundate the trial court with motions motivated more by posturing concerns than by proper legal grounds.

We note that the cases referred to the supervising judge include all those filed in the state based on exposure to asbestos. In numbered paragraph twelve of *Allman,* we provided for the inclusion of "asbestos cases filed subsequent" to that decision to be considered for transfer to the Mass Litigation Panel for disposition along with those cases already included in the group. 209 W.Va. at 734, 551 S.E.2d at 377. By referencing subsequently-filed asbestos cases, this Court was expressing its concern that the trial court should retain the ability to address both those asbestos cases already filed and included in the mass litigation grouping, as well as those cases yet to be filed that could properly be transferred for inclusion into the group. In addition, we observe that the trial court must maintain the necessary flexibility to address issues that arise during the pre-trial process, especially those issues deserving immediate attention such as those cases which, due to the severity of a particular plaintiff's injuries or

[19] As another means of ensuring that the rights of the parties receive the protection they deserve, we urge the trial court to place all discussions regarding substantive alterations to the trial scheduling order on the record.

medical condition, suggest expedited consideration for trial purposes.

Upon a full review of the petition and arguments, we do not find that Mobil has satisfied the requirements for issuance of a writ of prohibition. *See Berger*, 199 W.Va. at 14-15, 483 S.E.2d at 14-15, syl. pt. 4. Even if we chose to treat this petition solely as a petition for judicial review under TCR 26.01, similar to the *Allman* petition, we do not find the issues sufficiently ripe for review. The trial court deserves to be accorded the necessary flexibility to consider and address the issues raised by the parties and, perhaps even more critically, the opportunity to reevaluate the trial plan during its operation and to make necessary modifications when it determines that alterations are warranted. Lending further emphasis to the precipitous nature of this petition is the fact that the trial court simply has not had sufficient opportunity to identify with any finality the issues that are to be tried in common with regard to the liability phase or even to consider how the discovery process might be further tailored to address the issues to be tried at the various phases of the litigation, rather than to require all discovery to be completed by a date that precedes the initial liability trials.

While we chose to review the petition filed in *Allman* and the instant pleading filed by Mobil, we fully intend to allow the supervising judge to continue to fashion and implement various trial management plans without further intrusion by this Court. It is our clear preference not to address these cases again until final orders are in place and grounds for appeal are ripe. We recognize, however, that this Court may choose to exercise its constitutional grant of powers if, and when, issues of constitutional or overarching significance arise that demand immediate relief.

Having determined that Mobil has not demonstrated grounds sufficient to meet the standard for issuing a writ of prohibition, we hereby deny the requested relief; having no basis for issuing the requested extraordinary relief, we similarly are without grounds to issue a stay of the proceedings below. Given this Court's continuing concern that these cases proceed expeditiously, with due regard for all parties' rights, we hereby direct the entry of the necessary order and the issuance of the mandate pertaining to this petition forthwith.

Writ denied.

Maynard, Justice, concurring:

Frankly, this case leaves me with a profound disquiet. Mobil argues very persuasively and convincingly that the defendants have been denied due process in our courts. In fact, after a careful reading of the brief prepared by Steve Farmer, I am compelled to state that I am deeply concerned that Mobil is probably correct and some federal court will eventually tell us so. However, at this juncture at least, Mobil's claims of due process violations are premature because the trial court has not completed its trial plan. For that reason, I concur in the majority decision to deny extraordinary relief and write separately.

Initially, I must state that the observations and cautionary concerns set forth in the majority are troubling when viewed in light of opinions handed down by the United States Supreme Court. For example, in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 2250, 138 L.Ed.2d 689, 714 (1997), the Court upheld a court of appeals' decision to decertify an asbestos class which was intended to achieve a global settlement of current and future asbestos-related claims nationwide, stating that "individual

stakes are high and disparities among class members great." Two years later, the Court rejected another proposed global class of asbestos cases for essentially the same reasons. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999).

Mobil asserts, by referencing opinions such as these, that we may live to regret this decision for several reasons:

- the consolidation of thousands of dissimilar and unrelated asbestos claimants into a single trial violates procedural rules and the constitutional right to due process and equal protection;

- consolidation of asbestos cases violates Rule 42 of the West Virginia Rules of Civil Procedure, as well as the United States and West Virginia Constitutions;

- the use of a matrix to assess damages is a blatant and indefensible violation of Mobil's due process rights;

- the method for calculating punitive damages under the mass trial format advocated by the plaintiffs is unconstitutional;

- plaintiffs' mass trial plan offers no increased efficiency over single plaintiff trials; and

- a mass trial format will violate Mobil's right to a jury trial under state law and its due process rights.

As Mr. Farmer points out in his brief, this litigation involves thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different states of

development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spans the better part of six decades.

The predominance of individual and irreconcilable differences from plaintiff to plaintiff in this litigation is illustrated by the potential problems with choice of law issues. Moreover, as many as five thousand of the plaintiffs included in the June 24, 2002 mass trial are not West Virginia residents and were never exposed to asbestos in this State. Rather, they have migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation. This improper pilgrimage must be abated before one can even consider consolidation of cases to be a viable option.

West Virginia recognizes the doctrine of *lex loci delicti*, "that is, the substantive rights between the parties are determined by the law of the place of injury." *Vest v. St. Albans Psychiatric Hosp.*, 182 W.Va. 228, 229, 387 S.E.2d 282, 283 (1989); *McKinney v. Fairchild International, Inc.*, 199 W.Va. 718, 729, 487 S.E.2d 913, 924 (1997). Accordingly, the laws of many jurisdictions (including Pennsylvania, Ohio, Maryland, Kentucky, and Virginia, to name a few) will have to be considered and applied by a trial court during any mass trial in this litigation. The United States Supreme Court has established that, as a matter of due process, a state cannot categorically apply its substantive law to govern claims in which a state has little or no interest. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22, 105 S.Ct. 2965, 2979, 86 L.Ed. 628, 648 (1985).

All the due process arguments are compelling, but this is the due process claim about which I am most fearful of even-

tual reversal. Because so many of the plaintiffs have NO connection whatsoever with West Virginia, and because the United States Supreme Court was so clear in the *Phillips* case, I just don't see how the trial court can tread safely through this judicial minefield.

Further, these cases will require presentation of evidence concerning a myriad of highly individual facts, such as:

- the precise product(s) to which the plaintiff was exposed;
- the manner, conditions, and circumstances of each exposure;
- the dates, duration, and location of each exposure;
- the manner in which each alleged asbestos containing product was used;
- whether there was protective equipment available and actually used;
- the presence or absence of warnings included with the specific product(s) at issue; and
- each plaintiff's medical, family, and personal history, including such issues as whether and how much the plaintiff has used tobacco products, whether the plaintiff has experienced other occupational exposures to different substances (e.g., benzene, carbon tetrachloride, and coal dust) and the plaintiff's family health history.

The necessity of delving into such issues has been widely recognized by the courts. Given these individual issues, a mass trial—indeed, even small-group trials—would create a "Frankenstein's Monster" of the type postulated by the late

Professor Charles Alan Wright. *Castano v. American Tobacco Co.*, 84 F.3d, 734, 745 n.19 (5th Cir. 1996).

The suggestion in note 8 on page 27 of Mr. Farmer's brief is probably what we ought to do. He recommends: "If this Court wants to achieve a drastic and immediate reduction of the number of asbestos personal injury cases crowding the state's dockets, simply apply *lex loci delicti* and send the thousands of cases improperly filed here back to their correct jurisdictions." Also, due to the fact that the directives provided to the trial court in *State ex rel. Allman v. MacQueen*, 209 W.Va. 726, 551 S.E.2d 369 (2001), have not been fully implemented, I do not think we should have expressed "observations and cautionary concerns for the trial court's consideration and use." Instead, I would simply direct the trial court to proceed to resolve this "elephantine" mass of litigation in as efficient and effective manner as possible in accordance with the *Allman* directives. Then, if the concerns noted by the majority arise, they can be dealt with upon appeals taken from final orders.

I believe the majority opinion correctly denied extraordinary relief at this juncture in the litigation. However, in light of well-settled federal law, I fear that allowing every plaintiff who wishes to litigate a claim in West Virginia, even though he or she has no connection to this State, may violate the defendants' due process rights.

Notwithstanding the foregoing, there is another side to this issue which is equally thorny and troubling. If this mass litigation is simply halted, clearly all the plaintiffs would be denied their due process rights and their day in court. There should be a simple answer that would guarantee everyone's due process rights, but I cannot conceive or fashion one.

Accordingly, I concur in the final result.

Appendix B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION CIVIL ACTION NO. 01-C-9000

TRIAL SCHEDULING ORDER

Pursuant to Rule 26.01 of the West Virginia Trial Court Rules and the West Virginia Rules of Civil Procedure, the following schedule is hereby ORDERED by the court in the above-styled civil action.

I. OVERVIEW

Several thousand asbestos personal injury claims are currently pending before this court. All of these cases have been pooled and referred to the Mass Litigation Panel for the development of a case management plan or plans. Historically, in West Virginia and other states which experienced large numbers of asbestos-related personal injury suits, the trial of individual cases or of small groups of cases has resulted in time-consuming and expensive relitigation of common issues. These problems have, in turn, prevented courts from disposing of their asbestos cases with the same dispatch as their routine litigation and have caused inordinately high transaction costs which occasionally exceed the amounts recovered by injured plaintiffs.

In this state, over the past twenty years, the courts have developed a specialized approach to the asbestos personal injury litigation which has resulted in the prompt resolution of the cases in compliance with the requirements of Article 3, Section 17 of the West Virginia Constitution, and has reduced litigation costs to a fraction of what they would have

been if the cases had been tried on a piecemeal basis. That approach has been to sever, for a single initial trial, the liability issues which are common to all pending cases. While counsel have referred to this process as a "consolidation," it is not and has not been a consolidation as contemplated by Rule 42 of the West Virginia Rules of Civil Procedure and the decisional law relating to that Rule.

Virtually all of the arguments advanced in opposition to this court's announced intention to continue to use the trial methodology which has proven so effective at disposing of tens of thousands of asbestos-related claims so quickly and inexpensively are directed toward a consolidation of large numbers of cases for trial on all issues—a method that the court has never contemplated. The West Virginia Supreme Court of Appeals has expressly approved a trial plan which is substantially identical to that which follows. *See State ex rel. Appalachian Power Co. v. MacQueen,* 479 S.E.2d 300 (W. Va. 1996).

II. TRIAL DATE: SEPTEMBER 23, 2002

A. The trial format will be substantially identical to the previous consolidated "mass trials" which have been referred to as "Kanawha Mass 1, Kanawha Mass II, and Mon Mass II." The object of any trials will be to obtain verdicts on the issues related solely to the fault of the defendants in three general types of causes of action asserted by the plaintiffs. Those causes of action are (1) product liability claims; (2) premises liability claims; and (3) claims by employees against their employers under the provisions of W. Va. Code § 23-4-2. Three trial groups shall proceed simultaneously before three juries in a manner which will (1) minimize the recitation of common evidence; and (2) allow counsel in each group to focus on defendant-specific evidence and avoid con-

fusion of the jury. Further, in each trial group, except Group III, the jury will be asked to evaluate the conduct of each individual defendant to determine whether that conduct warrants awarding punitive damages and, if so, what ratio or proportion a punitive damages award should bear to any subsequent award of compensatory damages. All asbestos-related cases pending between the parties as of September 6, 2001, are subject to this Order.

1. Group I will consist of one trial to determine the common issues of fault of all manufacturers and distributors of asbestos-containing products, as well as any defendants whose purported fault is based on an allegation of a conspiracy, tortious joint venture, or other tortious combination with a manufacturer or distributor of asbestos-containing products. Specifically, interrogatories will be submitted to the jury for findings concerning whether and for what time period any defendant manufacturers sold or distributed a defective asbestos-containing product or whether and for what time period any other defendant engaged in a conspiracy, tortious joint venture, or other tortious combination with a manufacturer or distributor of asbestos-containing products.

2. Group II will consist of one trial to determine the common issues of fault of all premises liability defendants. Premises liability defendants are those defendants against which a cause of action is asserted for failure to maintain a safe workplace. Specifically, interrogatories will be submitted to the jury for findings concerning whether and for what time period any defendant had actual or constructive knowledge that asbestos-containing materials used in the workplace posed a risk of harm to workers exposed to the materials.

3. Group III will consist of one trial to determine the common issues of fault of the employer defendants for ac-

tions by employees under W. Va. Code § 23-4-2. Specifically, interrogatories will be submitted to the jury for findings concerning whether and for what time period any defendant (1) prior to May 9, 1983, was guilty of misconduct of a willful, wanton, and reckless character and had knowledge and appreciation of the high degree of risk of physical harm to employees resulting from exposure to asbestos-containing products in the workplace; or (2) subsequent to May 9, 1983, had a subjective realization and appreciation that the use of asbestos-containing products without warnings or appropriate safety measures in the workplace created an unsafe working condition and a high degree of risk and a strong probability of serious injury or death presented by the unsafe working condition.

4. The presiding Judge and two other Judges to be designated from the Mass Litigation Panel shall begin the trials described in subparagraphs 1-3 above by selecting three juries. The trials shall proceed simultaneously and, as necessary to avoid the presentation of repetitive evidence, the Judges may convene all juries together to hear common witnesses and receive common evidence.

5. The court recognizes that the parties are engaged in active settlement discussions, and that historically, large numbers of claims have been resolved in advance of the scheduled trials. If, in the judgment of the presiding Judge, sufficient numbers of defendants have reached complete settlements of all pending claims prior to trial, the trials on all the issues identified in subparagraphs 1-3 above may be held before a single jury.

6. Any verdicts returned in the three trial groups ("Groups I-III") shall be deemed to constitute a verdict on the relevant issues in all asbestos personal injury litigation which

has been referred to the Mass Litigation Panel by the Supreme Court of Appeals pursuant to Trial Court Rule 26.01.

7. Once verdicts are returned on the issues related solely to the fault of the defendants as described above, the jurors picked in Groups I-III will be dismissed. New juries will be impaneled for mini-trials which will be conducted to determine causation and damages. These mini-trials will begin four weeks after verdicts are rendered in Groups I-III. The mini-trials will consist of a number of plaintiffs against their common defendants. The preferred manner of addressing the causation and damages issues will be to break the parties down into manageable groups based on causes of action, geographic locations, and similar exposure criteria. At the beginning of each mini-trial, the Judge will read the verdict forms from the previous trials, including all special interrogatories and jury findings on each interrogatory, to the new jurors. The Judge will also advise the new jurors that they are bound by the decisions of the other juries and that they will only consider individual causation and damages.

8. Within two weeks after verdicts are reached in Groups I-III, a scheduling conference will be held for the causation and damages mini-trials.

B. The court never considered and hereby rejects a proposal for use of a matrix developed by utilizing depositions and findings of a master as the basis for the sample. The court will consider, however, the appropriateness of the use of a matrix constructed from actual jury verdicts, depending upon the type and number of cases remaining after verdicts are rendered in Groups I-III. At the current time, a workable plan for utilizing a matrix is not before the court, and there is no need to take evidence on the use of a matrix until at least the scheduling conference for the causation and

damages mini-trials. By that time, the court anticipates that it will be able to ascertain the necessity of implementing such a matrix based on the type of cases and the number of plaintiffs and defendants remaining in the action.

C. The matrix alternative will be used only if necessary to maintain the mandate of utilizing a jury system as required by Article 3, Section 13 of the West Virginia Constitution while also adhering to Article 3, Section 17 which requires that justice be administered without denial or delay. If it is determined by a jury or juries that the defendants have damaged many plaintiffs, and if the court determines that, by virtually all of the same activities, the defendants have injured plaintiffs so numerous that the plaintiffs will be denied their right to justice without excessive delay, then the court may be compelled to adopt a matrix based on actual jury verdicts to provide the parties their guaranteed access to justice.

III. MOTIONS:

A. All parties must file any pre-trial motions under Rule 12 of the West Virginia Rules of Civil Procedure, including any dispositive motions, by SEPTEMBER 5, 2002. Any responses to dispositive motions must be filed no later than SEPTEMBER 10, 2002.

B. All motions attacking the venue or jurisdiction of the court MUST be filed by MARCH 25, 2002 or they will be waived. Parties opposing such motion(s) must file their written responses no later than APRIL 8, 2002. No such motions shall be fled if already ruled upon in this action. Hearing on said motions will be held on APRIL 11, 2002.

C. Motions for summary judgment may be filed by AUGUST 29, 2002, if discovery on the individual case warrants it.

D. All motions in this case shall be filed with the Kanawha County Circuit Clerk's Office in Case No. 02-C-9004, with a courtesy copy sent to the Honorable Martin J. Gaughan, Brooke County Courthouse, P.0. Box 474, Wellsburg, West Virginia 26070.

IV. DISCOVERY:

E. PLAINTIFFS' CERTIFICATION:

1. By MARCH 8, 2002, plaintiffs' counsel must certify to the court the identity of all plaintiffs remaining in the case by providing the following information for each remaining plaintiff: (1) name of plaintiff or plaintiff's decedent; (2) name of spouse; (3) plaintiff's address; (4) plaintiffs date of birth; (5) plaintiff's decedent's date of death, if applicable; (6) plaintiff's social security number; (7) asbestos-related disease diagnosis alleged; (B) date of diagnosis; (9) plaintiff's occupation or trade; (10) name and address of premises where plaintiff worked; (11) place where plaintiff was residing when the alleged exposure to asbestos occurred; (12) name of plaintiff's employer at each premises; (13) trade and dates of employment at each site; (14) dates and places of alleged exposure to asbestos for each defendant; (15) identification of asbestos-containing products/manufacturers to which each plaintiff was allegedly exposed at each premises (identify by product, premises, and dates of alleged exposure); (15) identification of those defendants against which each remaining plaintiff asserts a claim in this lawsuit; and (17) theory of liability for each remaining defendant.

2. Any plaintiffs not certified as described above will be dismissed from the case with prejudice.

3. Within ten (10) days after verdicts are rendered in Groups I-III, plaintiffs' counsel must again certify to the

court (1) which plaintiffs remain in this case; and (2) who the remaining defendants are for each plaintiff.

F. DEFENDANTS' ACKNOWLEDGMENT:

1. All defendants must acknowledge which certified plaintiffs have actions pending against them by APRIL 2, 2002. The defendants must provide each such plaintiff any of the following information that they have under their control which is applicable to the pending cases: (1) whether they manufactured, supplied, used, or allowed to be used asbestos-containing products during the time and at the places designated by the plaintiffs; (2) the dates of an employee's hiring; (3) the dates of various job assignments held by the employee (this requirement refers to general job assignments, i.e., crane operator in the strip steel, and not daily or weekly moves within the work site); and (4) the time period when any non-employee plaintiff's employers or outside companies had a contract to provide services within the premises, as well as a general description of the contract or project, i.e., install lining of boiler #2. This last requirement is not meant to instruct the defendants to provide an indication of each day an individual may have been on the premises.

2. All defendants who do not disclose said information, or a reasonable explanation as to why they cannot provide said information, will be deemed to have admitted the accuracy of the plaintiffs disclosure and will not be permitted to offer evidence to rebut such disclosure.

G. Discovery on all issues may begin on MARCH 12, 2002. Said discovery shall be conducted in accordance with the First Master Case Management Order filed on May 24, 2001, so long as it does not contravene the specific requirements of this Order.

H. EVIDENTIARY DEPOSITIONS:

1. Defendants may begin to take depositions of the plaintiffs on MARCH 27, 2002.

2. Depositions of the defendants' experts may begin on MAY 16, 2002.

3. All depositions must be completed by AUGUST 5, 2002.

4. All parties shall designate in writing any depositions they intend to use at trial, including page(s) and line number(s) by AUGUST 9, 2002.

I. WITNESS DISCLOSURE:

1. Plaintiffs must disclose all product and premises identification, and witnesses they intend to call at trial by APRIL 16, 2002, along with the following information: (1) what product(s) they will be identifying; (2) on which premises the products were located; and (3) their addresses and phone numbers. If this information is not provided by the deadline, such witnesses will not be permitted to testify at trial.

2. Plaintiffs must provide a list of their expert witnesses who will be testifying at trial, along with detailed reports or reference to previous reports or depositions, on or before APRIL 16, 2002. Defendants must provide a list of their expert witnesses who will be testifying at trial, along with detailed reports or reference to previous reports or depositions, on or before MAY 16, 2002.

3. Plaintiffs must disclose all lay witnesses (excluding product and premises identification witnesses) not previously disclosed by MAY 16, 2,002. The defendants must disclose

all lay witnesses that they intend to call at trial by JUNE 17, 2002.

4. Plaintiffs must disclose any rebuttal experts by JUNE 5, 2002.

J. Plaintiffs must provide all tissue for mesotheliomas or other malignancies by APRIL 26, 2002. In the event additional material becomes available or is discovered thereafter, it shall be provided within seven days after first coming into possession of plaintiffs' counsel.

K. Within fifteen days after verdicts are rendered in Groups I-III, parties must identify all lay witnesses who are testifying in the causation and damages mini-trials, along with addresses and phone numbers of those witnesses.

L. MEDICAL EXAMINATIONS:

1. Defendants may begin scheduling Rule 35 medical examinations by MARCH 12, 2002.

2. If, by APRIL 12, 2002, plaintiffs provide defense counsel with general medical authorizations for the last ten (10) years and authorizations for all treatments or tests associated with a plaintiffs lungs and an affidavit covering a plaintiff's smoking history and/or use of tobacco products, the plaintiffs will not have to produce any medical records except those their treating physician and/or medical experts will rely upon at trial.

3. With regard to those plaintiffs who meet the medical and smoking disclosures deadline set forth above, associated defendants must complete all Rule 35 medical examinations by AUGUST 5, 2002. Those plaintiffs who do not meet the disclosure deadlines must complete all Rule 35 medical examinations by the end of discovery.

4. Plaintiffs will be required to submit to one (1) and only one (1) Rule 35 examination unless the court rules otherwise.

5. The defendants shall promptly pay all reasonable expenses incurred by any plaintiff in attending a medical examination, including travel expenses.

M. The last day to file interrogatories, requests for production, and requests for admission is JULY 1, 2002.

N. The parties must provide exhibit lists by JULY 15, 2002. Any objections to the exhibit lists must be filed by AUGUST 5, 2002. Any replies to the other's objections to exhibits must be filed by AUGUST 26, 2002.

O. The plaintiffs must produce their final witness list for use at trial by JULY 15, 2002. Defendants must produce their final witness list for use at trial by JULY 22, 2002.

P. Defendants may provide a letter to any plaintiff requesting dismissal for lack of product or premises identification by AUGUST 9, 2002. Plaintiffs must respond in writing to any defendant's "no evidence" letter by AUGUST 29, 2002. Failure to respond may result in a dismissal with prejudice of the defendant submitting the letter.

Q. DOCUMENTS:

1. All documents to be used at trial which have already been admitted in a previous asbestos mass litigation must be designated by the appropriate identifications previously assigned to it by MAY 10, 2002.

2. On or before APRIL 24, 2002, all documents already filed in a previous mass litigation but not admitted into evidence must be designated by the appropriate designation with an indication of any previous ruling on its admissibility.

3. Any documents that have not been previously offered in any asbestos mass litigation trial must be disclosed by AUGUST 16, 2002. This does not refer to documents relating to individual medical treatment.

4. Any settlement or document conferences may be scheduled starting on SEPTEMBER 5, 2002.

R. DISCOVERY COMPLETION DATE: SEPTEMBER 5, 2002

All expert discovery and trial depositions to be used in Groups I-III must be completed by the end of discovery. At this time, the defendants will collectively submit a detailed schedule to the court and to plaintiffs' counsel establishing times for specific defendant-related documents and for settlement conferences with specific defendants. So far as is practicable, document issues relating to certain defendants will be dealt with in the morning session of court and settlement conferences for the same defendants will be held in the afternoon session.

It is further ORDERED that the Clerk of the Circuit Court of Kanawha County, West Virginia, provide a copy of this Order to lead counsel for the parties from whom the court received pleadings in the original jurisdiction proceedings and to all counsel of record in Civil Action No. 01-C-9000.

It is further ORDERED that the Clerk of the Circuit Court of Kanawha County, West Virginia file this Order in both the general administrative file, Case No. 01-C-9000, as well as in the specific file for the September trial, Case No. 02-C-9004.

Appendix C

WEST VIRGINIA TRIAL COURT RULE 26.01: MASS LITIGATION PANEL AND PROCEDURE

(a) The Mass Litigation Panel shall consist of six (6) active or senior status circuit judges who shall be appointed by the Chief Justice, with the Approval of the full Court. Each shall serve on the Panel for a term of three (3) years, two (2) to be appointed each year. There shall be no prohibition against serving successive terms. The Chief Justice shall annually designate one of the members of the Panel to serve as its chairman to preside over the activities of the Panel and to report to the Supreme Court of Appeals.

(b) The Mass Litigation Panel shall have the following responsibilities:

1. To develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice;

2. To preside over actions referred to it by the Chief Justice and to provide assistance and guidance to any other circuit judge within the State upon assignment by the Chief Justice;

3. To make recommendations to the Chief Justice on the transfer of actions from one circuit to another in order to facilitate any case management or trial methodologies developed by the Panel, and to request the assignment of additional circuit judges to assist in any activities that may be

necessary to resolve actions or issues in actions that may be referred to the Panel;

4. To recommend rules for adoption by the Supreme Court of Appeals for the conduct of the business of the panel;

5. To report periodically to the Chief Justice concerning its activities; and

6. To take such action as is reasonably necessary and incidental to the powers and responsibilities expressly conferred by this rule or by the specific directive of the Chief Justice.

(c) "Mass litigation" shall be defined as two (2) or more civil actions ending in one or more circuit courts: (a) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or (b) involving common questions of law or fact in "personal injury mass torts" allegedly incurred upon numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (c) involving common questions of law or fact in "property damage mass torts" allegedly incurred upon numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (d) involving common questions of law or fact in "economic loss" cases incurred by numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect with-

out actual product failure or injury.

(d) Any coordinated or consolidated actions transferred pursuant to this rule shall be conducted by a member or members of the Panel and/or by a judge to whom the actions are assigned by the Chief Justice. Any member of the Panel or any circuit judge to whom actions are assigned under this rule shall be authorized to exercise the powers of a circuit judge in any circuit in which actions are pending or have been transferred for the purpose of conducting any proceedings consistent with the Panel's case management and trial methodologies.

(e) Any party, judge, or the Administrative Director of the Courts may seek a referral to the Panel for transfer of actions by filing a Motion to Refer to Mass Litigation Panel in any circuit court in which a qualified case is ending. The motion shall identify the nature of the actions sought to be referred, the number of plaintiffs, the number of defendants, the number of actions pending, the basis for the request, a listing of the particular cases in all the circuits for which a referral is being requested, and, if known, whether additional related actions may be filed in the future.

Said motion may be filed within six (6) months after the filing date of the case in which the motion is being filed; provided, however, that a judge or the Administrative Director may file said motion at any time, if it is determined that litigation qualifies as mass litigation and that the litigation may be resolved more expeditiously by reference to the Panel.

The motion shall be served on all the parties, all judges in actions which are the subject of the motion, and the Administrative Director. Any party shall have twenty (20) days after the motion is filed to file a reply memorandum stating its po-

sition and opposition, if any. Any affected judge may file a reply memorandum within ten (10) days thereafter.

After the response periods have expired, the judge of the court in which the motion was filed shall forward to the Chief Justice a copy of the motion and reply memoranda filed in the case. Upon review of the motion and reply memoranda, the Chief Justice may act directly upon the motion or may direct the Panel to conduct a hearing and make recommendations concerning coordinated or consolidated proceedings under this rule. The Chief Justice shall act upon the motion within ten (10) days.

If the motion is referred to the Panel, the Panel or a designated member of the Panel shall hold a hearing to receive evidence and entertain arguments by the parties or any judge, and shall submit findings of fact and a recommendation to the Chief Justice. Said recommendation shall be provided to he Chief Justice within twenty (20) days from the date the matter was referred to the Panel.

The Chief Justice, whether acting directly upon the motion or upon the recommendation of the Panel, shall enter an order either granting or denying the motion, or by providing modified relief consistent with this rule within ten (10) days.

(f) The filing of a motion under subsection (e) of this rule shall not operate to stay discovery in any affected case in any instance or to delay a scheduled trial unless a stay of a trial is ordered by the Chief Justice.

(g) Nothing contained in this rule shall be deemed to affect the authority of a circuit judge to act independently under the provisions of W.Va. R.Civ.P. 42.